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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ZEFF RUBEN AVALOS,

Defendant and Appellant.

H033641

(Santa Clara County

Super. Ct. No. CC766923)

Following approximately three and one half days of testimony, a jury found Zeff Avalos (defendant) guilty of one count of aggravated sexual assault of a child under the age of 14 years with the defendant at least 10 years older (Pen. Code, § 269, subd. (a)(5), count one, [sexual penetration by foreign object of Rose Doe, § 289, subd. (a)]);¹ one count of aggravated sexual assault of a child under the age of 14 years with the defendant at least 10 years older (§ 269, subd. (a)(5), count two, [sodomy of Rose Doe, § 286 occurring between June 1, 1999 and July 1, 1999]); one count of sodomy by force of Rose Doe (§ 286, subd. (c)(2), count three [occurring between August 1, 1999 and March 30, 2000]); one count of oral copulation by force or violence of Rose Doe (§ 288a, subd. (c)(2) [occurring between August 1, 1999 and March 30, 2000]); and one count of lewd

¹ Unless noted, all section references are to the Penal Code.

or lascivious act on a child age 14 or 15 (R. Doe) (§ 288, subd. (c)(1), count five [occurring between April 18, 2007 and April 19, 2007]).

Defendant admitted that he had two prior strike convictions within the meaning of sections 667, subdivisions (b)-(i) and 1170.12.

On November 7, 2008, the court granted defendant's request to dismiss one prior strike conviction as to only count five, but it appears that because the events in counts one through four preceded the two prior strike convictions the court struck the prior convictions as to those counts. The court sentenced defendant to 30 years to life, consecutive to 16 years. The court calculated the sentence by imposing terms of 15 years to life on counts one and two, the mid-term of six years for counts three and four, and the mid-term of two years doubled because of the prior strike conviction for count five, with all terms to be served consecutively to each other. The court imposed a \$10,000 restitution fund fine calculated under the formula set forth in section 1202.4, subdivision (b)(2).² The court imposed and stayed a parole revocation fine in the same amount pursuant to section 1202.45. The court awarded defendant 541 actual days credit for time served and 81 days presentence conduct credits pursuant to section 2933.1, for a total of 622 days. The court ordered that defendant pay \$546 in victim restitution.

Defendant filed a notice of appeal on December 5, 2008.

We appointed counsel to represent defendant in this court. Counsel filed an opening brief that stated the facts, but raised no specific issues.

On June 30, 2009, we notified defendant of his right to submit written argument on his own behalf within 30 days. To date, we have not received a response from defendant.

² The formula would have resulted in a restitution fine of \$46,000, but is limited by section 1202.4, subdivision (b)(1) to \$10,000.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, we have reviewed the entire record and have concluded that there are no arguable issues on appeal. Pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, we provide "a brief description of the facts and procedural history of the case, the crimes of which the defendant was convicted, and the punishment imposed." (*Id.* at p. 110.) We have included information about aspects of the trial court proceedings that might become relevant in future proceedings. (*Id.* at p. 112.)

Facts

Counsel stipulated that the defendant was born on August 12, 1962.

Count Five; R. Doe

Around midnight on April 18, when R. was 15 years old, she was sleeping on the couch in the living room of her grandparents' house, when the defendant, her uncle, rubbed her on her thigh. At first, R. thought that it was a dream, but when she awoke she heard her grandfather shout, "What are you doing?" R. saw defendant rubbing the front of her legs from her pelvis down to her knees for just a few seconds. Defendant was breathing hard. R. heard defendant say that he was "tucking [her] into bed" and looking for the remote control to the television that was in the living room. R. testified that she was not upset about what had happened, but sad.

R. went to her grandmother's bedroom and told her what had happened. Her grandmother told R. to ask R.'s cousin if she could sleep in her room. R.'s grandmother told her to lock the door. However, R. went to the room in which her sister M. was sleeping and slept with her. The next day R. told her mother what had happened and her mother took her to the police station.

A little while later, the police arranged for R. to make a pretext phone call to the defendant, which was recorded. The defendant said he was sorry; he was on "PCP." The defendant said he was only tucking her in; he did not know what he was doing.

M., R.'s sister, testified that around midnight on April 18, R. entered the room in which she was sleeping. R. was crying and told M. that the defendant had touched her.

The defendant's sister, who is also R.'s and M.'s mother, testified that R. told her something had happened causing her to take R. to the police.

Counts one through four; Rose Doe

Rose Doe was born August 1, 1985. Rose knew defendant when her mother C. was dating the defendant. The defendant and C. dated for about 14 years starting in 1994 when Rose was nine years old. When Rose was 10 years old, she lived in a one bedroom apartment with her sister Linda, their mother, and the defendant. Rose and Linda slept in the living room. When Rose and the defendant were alone, he would "pet" her vagina over her clothing and touch her legs and thighs. She did not say anything about what was happening out of fear because when the defendant and her mother argued, the defendant would pull her mother's hair and slap and punch her. In addition, the defendant was bigger than Rose, so she believed that the defendant would hit her if she resisted. From the time she was about 11 years old to when she was 12 years old the defendant would touch Rose on her vagina over her clothes about once a week. Sometimes, the defendant would show Rose pornography.

When Rose was 12 and 13 years old, the defendant penetrated her vagina with his finger "dozens of times." Later, they all moved from the Sunnyvale apartment to a condo in San Jose. The defendant was laid off from work in the summer of 1999, when Rose was 13 years old. The defendant would make Rose orally copulate him. This continued until Rose turned 14 in the August of that year.

One day when Rose was watching television in the living room and the defendant was rubbing her legs, he told her to lie face down on the floor. As she did, the defendant pulled down her pajamas and sodomized her. The defendant used a condom. Defendant continued to sodomize Rose three or four times a week throughout the rest of the summer of 1999. When Rose squirmed or tried to turn her body, the defendant would hold her

down. He called her names and threatened to kill her. Sometimes, he punched her or pulled her hair. The defendant was trained in martial arts and had knives in a display case.

The sexual abuse stopped in approximately February 2000. Rose's best friend died in January 2000, and Rose became depressed and rebellious. In March 2000, there was a large argument between C. and the defendant and Rose got involved. The defendant threw C., Rose and Linda out of the condo.

Rose acknowledged that she participated in family counseling with her mother and the defendant, but that she never disclosed during counseling what had happened to her. However, she did tell her friend Ma. when they were sophomores in high school. When Rose learned of R.'s allegation concerning the defendant, Rose contacted the police.

Ma. testified that when she was in school, she considered Rose to be her best friend. Ma. remembered an incident when she and Rose were arguing. Rose started crying and told her that something had happened between her and the defendant. Ma. assumed that Rose meant that she was being molested. Ma. suggested that Rose tell her mother and grandmother, but Rose declined so to do.

Linda testified that when she lived in the Sunnyvale apartment with the defendant and the rest of her family, the defendant exposed himself to her one day while she was watching television. The defendant stopped and stood in front of her. His sweat pants were lowered exposing his penis. Linda covered her eyes and told the defendant to leave or she would scream. Eventually, Linda told her mother what had happened.³

Procedural History

The Santa Clara County District Attorney filed an information on November 30, 2007, charging the defendant with two counts of aggravated sexual assault of a child

³ Linda's testimony was admitted under Evidence Code section 1108.

under the age of 14 years with the defendant at least 10 years older (Pen. Code, § 269, subd. (a)(5), counts one and two, victim Rose Doe); one count of sodomy by force of Rose Doe, (§ 286, subd. (c)(2), count three); one count of oral copulation by force or violence of Rose Doe (§ 288a, subd. (c)(2)); and one count of lewd or lascivious act on a child age 14 or 15 (R. Doe) (§ 288, subd. (c)(1)), count five). The information alleged that the defendant had suffered two prior strike convictions within the meaning of sections 667, subdivisions (b)-(i) and 1170.12.

Before trial the prosecutor moved in limine, pursuant the fresh complaint doctrine, to allow M. to testify to what R. had told her and to allow R.'s mother to testify what R. had told her, and what Rose had told her friend Ma. The prosecutor pointed out that R.'s statement to her sister was admissible as an excited utterance. Defense counsel objected to any of this testimony coming in, but the court ruled that R.'s statement to her sister and Rose's statement to Ma. could come in pursuant to the fresh complaint doctrine. However, after conducting an Evidence Code section 352 analysis, the court precluded R.'s mother testifying to what R. had told her. The court gave a general instruction on evidence being admitted for a limited purpose before any witnesses testified and before the jury retired to deliberate.

In conclusion, our review of the entire record satisfies this court that defendant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Wende, supra*, 25 Cal.3d at p. 441.)

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.